



HIGH COURT OVERTURNS WORKPAC V ROSSATO RULING ON CASUAL EMPLOYMENT

The recent High Court decision in *WorkPac Pty Ltd v Rossato & Ors* [2021] HCA 23 has marked a further development in the categorisation of casual employees and further clarifies the position following the passage of the Industrial Relations Omnibus Bill in late 2020, which provided the first statutory definition of casual employment.

Who is a Casual Employee?

Following the passing of the Industrial Relations Omnibus Bill, the meaning of 'casual employee' is now defined under section 15A of the Fair Work Act 2009 (Cth) (Act). A person is considered a casual employee if:

- an offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work; and
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

For the purpose of determining whether the employer “makes no firm advance commitment to continuing and indefinite work” at the time an offer is made, regard can only be had to:

- whether the employer can elect to offer work (and whether the employee can elect to accept or reject that work);
- whether the employee works as required according to the needs of the employer;
- whether the employment is described as casual employment; and
- whether the employee will be entitled to a casual loading or a specific rate of pay as a casual employee.

The subsequent conduct of the parties has no bearing on whether a person is or is not a casual employee.



The Previous Decision in WorkPac v Rossato

This represents a marked shift from the way the law previously assessed whether a person was a permanent or casual employee, including from the earlier judgements in the WorkPac litigation itself.

The Full Court of the Federal Court had previously considered this issue in WorkPac v Rossato [2020] FCAFC 84. Notwithstanding that Mr Rossato had been initially engaged as a casual employee, the Full Court deemed that Mr Rossato's engagements equated to stable, regular and predictable employment, for which he received weekly rosters fixed for long periods of time. In addition, these rosters were often provided well in advance (up to seven months). This was viewed by the Court to indicate a "firm advance commitment" to employment, being similar to that ordinarily afforded to a permanent employee.

In effect, the Full Court's decision clarified that engaging someone as a casual employee, paying them a casual loading and calling them a casual under their contract of employment would not necessarily make them a genuine casual employee if their pattern of work suggested otherwise. Despite having been paid a casual loading, Mr Rossato was deemed to be a permanent employee and therefore entitled to annual leave, paid personal leave and compassionate leave.

High Court Appeal

WorkPac was granted leave to appeal to the High Court of Australia, which overturned the earlier judgement and found that Mr Rossato was a casual employee who worked on an "assignment by assignment basis" and, as such, was not entitled to paid annual leave, personal leave or compassionate leave under the Act.

In handing down its decision, the High Court clarified certain issues in relation to casual employment:

- "Firm advance commitment" as to days and hours of work is to be determined by the terms of the applicable contract of employment in circumstances where parties have committed the terms of employment to a written contract.
- Employers who have given clear expression to the casual nature of employment in their contracts will be able to rely on this characterisation, regardless of the manner in which the employment relationship has developed, or the expectations of the employees.
- If the employment contract genuinely reflects a casual engagement, this will be recognised by the courts.
- Payment of casual loading in lieu of entitlements is still a strong indicator of casual employment, reducing the risk of 'double dipping' claims.
- A fixed roster, even if set well in advance, will not provide a firm advance commitment to ongoing work where such a roster is still consistent with the nature of the engagement, the employer is not obliged to offer further assignments and the employee can accept or reject assignments.



Key Takeaways from the High Court's Judgement

The High Court's decision, in tandem with the earlier passing of the Omnibus Bill, offers greater clarity in respect of what constitutes casual employment than was previously the case in the aftermath of the Full Court's previous judgement in *Rossato* (as well as the earlier judgement in *Workpac v Skene* [2018] FCAFC 131).

It also significantly reduces the risk of so-called "double dipping" claims by employees, where an employee who has already received a casual loading seeks payment for annual leave, paid personal leave and compassionate leave. This is compounded by the fact, even if someone who is engaged as a casual employee is later deemed to be eligible to receive entitlements reserved for permanent employees, the Court must offset the obligation to pay such entitlements against any casual loading the employee has already received.

Employers should now consider whether their employment agreements for casual employees (in particular) need to be revised to better clarify the scope of their employees' engagement, in order to reduce the risk of confusion and potential entitlement claims. Any employees who are unsure of their rights and entitlements should seek legal advice on the subject.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

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